RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

EX PARTE: IN THE MATTER OF AUGUST SPIES AND OTHERS.

Application for the allowance of a writ of error to the Supreme Court of the State of Illinois.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

When, as in this case, application is made to us on the suggestion of one of our number, to whom a similar application had been previously addressed, for the allowance of a writ of error to the highest court of a State under § 709 of the Revised Statutes, it is our duty to ascertain not only whether any question reviewable here was made and decided in the proper court below, but whether it is of a character to justify us in bringing the judgment here for re-examination. In our opinion the writ ought not to be allowed by the court, if it appears from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our own well-considered judgments in similar cases. That is in effect what was done in *Twitchell* v. *The Commonwealth*, 7 Wall. 321, where the writ was refused, because the questions presented by the record were "no longer subjects of discussion here," although if they had been, in the opinion of the court, "open," it would have been allowed. When, under § 5 of our Rule 6, a motion to affirm is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm when "the question on which our jurisdiction depends was so manifestly decided right that the case ought not to be held for further argument": *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 195; *Church* v. *Kelsey*, 121 Id. 282. The propriety of adopting a similar rule upon motions in open court for the allowance of a writ of error is apparent, for certainly we would not be justified as a court in sending out a writ to bring up for review a judgment of the highest court of a State, when it is apparent on the face of the record that our duty would be to grant a motion to affirm as soon as it was made in proper form.

In the present case we have had the benefit of argument in support of the application, and while counsel have not deemed it their duty to go fully into the merits of the Federal questions they suggest, they have shown us distinctly what the decisions were of which they complain, and how the questions arose. In this way we are able to determine as a court in session whether the errors alleged are such as to justify us in bringing the case here for review.

We proceed, then, to consider what the questions are on which, if it exists at all, our jurisdiction depends. They are thus stated in the opening brief of counsel for petitioners:

"First. Petitioners challenged the validity of the statute of Illinois, under and pursuant to which the trial jury was selected and empanelled, on the ground of repugnancy to the Constitution of the United States, and the State court sustained the validity of the statute.

"Second. Petitioners asserted and claimed, under the Constitution of the United States, the right, privilege, and immunity of trial by an impartial jury, and the decision of the State court was against the right, privilege, and immunity so asserted and claimed.

"Third. The State of Illinois made, and the State court enforced against petitioners, a law (the aforesaid statute) whereby the privileges and immunities of petitioners, as citizens of the United States, were abridged, contrary to the Fourteenth Amendment of the Federal Constitution.

"Fourth. Upon their trial for a capital offence, petitioners were compelled by the State court to be witnesses against themselves, contrary to the provisions of the Constitution of the United States, which declare that 'no person shall be compelled in any criminal case to be a witness against himself,' and that 'no person shall be deprived of life or liberty without due process of law.'

"Fifth. That by the action of the State court in said trial petitioners were denied 'the equal protection of the laws,' contrary to the guaranty of the said Fourteenth Amendment of the Federal Constitution."

The particular provisions of the Constitution of the United States on which counsel rely are found in Articles IV, V, VI, and XIV of the Amendments, as follows:

Art. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

Art. V. "No person * * * shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law."

Art. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

Art. XIV, § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

That the first ten Articles of Amendment were not intended to limit the powers of the State governments in respect to their own people, but to operate on the National Government alone, was decided more than a half century ago, and that decision has been steadily adhered to since: *Barron* v. *Baltimore*, 7 Peters 243, 247; *Livingston* v. *Moore*, Id. 469, 552; *Fox* v. *Ohio*, 5 How. 410, 434; *Smith* v. *Maryland*, 18 Id. 71, 76; *Withers* v. *Buckley*, 20 Id. 84, 91; *Pervear* v. *The Commonwealth*, 5 Wall. 475, 479; *Twitchell* v. *The Commonwealth*, 7 Id. 321, 325; *The Justices* v. *Murray*, 9 Id. 274, 278; *Edwards* v. *Elliott*, 21 Id. 532, 557; *Walker* v. *Sauvinet*, 92 U. S. 90; *United States* v. *Cruikshank*, 92 Id. 542, 552; *Pearson* v. *Yewdall*, 95 Id. 294, 296; *Davidson* v. *New Orleans*, 96 Id. 97, 101; *Kelly* v. *Pittsburgh*, 104 U. S. 79; *Presser* v. *Illinois*, 116 U. S. 252, 265.

It was contended, however, in argument that, "though originally the first ten amendments were adopted as limitations on Federal power, yet in so far as they secure and recognize fundamental rights—common-law rights—of the man, they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words, while the ten amendments as limitations on power only apply to the Federal Government, and not to the States, yet in so far as they declare or

recognize rights of persons, these rights are theirs, as citizens of the United States, and the Fourteenth Amendment as to such rights limits State power, as the ten amendments had limited Federal power."

It is also contended that the provision of the Fourteenth Amendment, which declares that no State shall deprive "any person of life, liberty, or property without due process of law," implies that every person charged with crime in a State shall be entitled to a trial by an impartial jury, and shall not be compelled to testify against himself.

The objections are in brief, 1, that a statute of the State as construed by the court deprived the petitioners of an impartial jury; and, 2, that Spies was compelled to give evidence against himself. Before considering whether the Constitution of the United States has the effect which is claimed, it is proper to inquire whether the Federal questions relied on in fact do arise on the face of this record.

The statute to which objection is made was approved March 12, 1874, and has been in force since July 1 of that year. Hurd's Rev. Stat. Ill., 1885, p. 752, c. 78, § 14. It is as follows:

"It shall be sufficient cause of challenge of a petit juror that he lacks any one of the qualifications mentioned in section 2 of this act; or if he is not one of the regular panel, that he has served as a juror on the trial of a cause in any court of record in the county within one year previous to the time of his being offered as a juror; or, that he is a party to a suit pending for trial in that court at that term. It shall be the duty of the court to discharge from the panel all jurors who do not possess the qualifications provided in this act, as soon as the fact is discovered: *Provided*, if a person has served on a jury in a court of record within one year, he shall be exempt from again serving during such year, unless he waives such exemption: *Provided further*, that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: and *provided further*, that in the trial of any criminal cause, the fact that a

person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

The complaint is that the trial court, acting under this statute and in accordance with its requirements, compelled the petitioners against their will to submit to a trial by a jury that was not impartial, and thus deprived them of one of the fundamental rights which they had as citizens of the United States under the National Constitution, and if the sentence of the court is carried into execution they will be deprived of their lives without due process of law.

In *Hopt* v. *Utah*, 120 U. S. 430, it was decided by this court that when "a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant and excused, and an impartial and competent juror is obtained in his place, no injury is done the defendant, if until the jury is completed he has ther peremptory challenges which he can use." And so in *Hayes* v. *Missouri*, 120 U. S. 71, it was said: "The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained." Of the correctness of these rulings we entertain no doubt.

We are, therefore, confined in this case to the rulings on the challenges to the jurors who actually sat at the trial. Of these there were but two—Theodore Denker, the third juror who was sworn, and H. T. Sanford, the last, who was called and sworn after all the peremptory challenges of the defendants had been exhausted.

At the trial, the court construed the statute to mean, that, "although a person called as a juryman may have formed an opinion based upon rumor or upon newspaper statements, but has expressed no opinion as to the truth of the newspaper statement, he is still qualified as a juror if he states that he can fairly and impartially render a verdict thereon in accordance with the

law and the evidence, and the court shall be satisfied of the truth of such statement. It is not a test question the juror will have the opinion which he has formed from newspapers changed by the evidence, but whether his verdict will be based only upon the account which may here be given by witnesses under oath."

Interpreted in this way, the statute is not materially different from that of the Territory of Utah, which we had under consideration in *Hopt* v. *Utah*, *ubi supra*, and to which we then gave effect. As that was a territorial statute, passed by a territorial legislature for the government of a territory over which the United States had exclusive jurisdiction, it came directly within the operation of art. 6 of the Amendments, which guaranteed to Hopt a trial by an impartial jury: *Webster* v. *Reid*, 11 How. 437, 459. No one at that time suggested a doubt of the constitutionality of the statute, and it was regarded, both in the territorial courts and here, as furnishing the proper rule to be observed by a territorial court in empanelling an impartial jury in a criminal case.

A similar statute was enacted in New York, May 3, 1872 (Acts of 1872, c. 475, 9 N. Y. Stat. at Large, 2d ed., 373); in Michigan, April 18, 1873 (Acts of 1873, 165, Art. 117; Howell's Stat., § 9,564); in Nebraska (Comp. Stat. Neb. 1885, p. 838; Criminal Code, § 468); and in Ohio (Rev. Stat. Ohio, 1880, § 7,278). The constitutionality of the statute of New York was sustained by the Court of Appeals of that State in *Stokes* v. *The People*, 53 N. Y. 164, 172, decided June 10, 1873, and that of Ohio, in *Cooper* v. *State*, 16 Ohio St. 328. So far as we have been able to discover, no doubt has ever been entertained in Michigan or Nebraska of the constitutionality of the statutes of those States respectively, but they have always been treated by their Supreme Court as valid, both under the Constitution of the United States, and under that of the State: *Stephens* v. *The People*, 38 Mich. 739, 741; *Ulrich* v. *The People*, 30 Mich. 245; *Murphy* v. *The State*, 15 Neb. 383.

Indeed, the rule of the statute of Illinois as it was construed by the trial court is not materially different from that which has been adopted by the courts in many of the States without legislative action: *Commonwealth* v. *Webster*, 5 Cush. 295; *Holt* v. *The People*, 13 Mich. 224; *State* v. *Fox*, 1 Dutch. 566;

Oslander v. *The Commonwealth*, 3 Leigh 780; *State* v. *Ellington*, 7 Iredell 61; *Smith* v. *Eames*, 3 Scam. 81. See also an elaborate note to this last case in 36 Am. Dec. 521, where a very large number of authorities on the subject are cited.

Without pursuing this subject further, it is sufficient to say that we agree entirely with the Supreme Court of Illinois in its opinion in this case, that the statute on its face, as construed by the trial court, is not repugnant to § 9 of Art. 2 of the Constitution of that State, which guarantees to the accused party in every criminal prosecution "a speedy trial by an impartial jury of the county or district in which the offence is alleged to have been committed." As this is substantially the provision of the Constitution of the United States on which the petitioners now rely, it follows that, even if their position as to the operation and effect of that Constitution is correct, the statute is not open to the objection which is made against it.

We proceed, then, to a consideration of the grounds of challenge to the jurors Denker and Sanford, to see if in the actual administration of the rule of the statute by the court, the rights of the defendants under the Constitution of the United States were in any way impaired or violated.

Denker was examined by the counsel for the defendants when he was called as a juror, and, after stating his name and place of residence, proceeded as follows:

"Q. You heard of this Haymarket meeting, I suppose? A. Yes.

"Q. Have you formed an opinion upon the question of the defendants' guilt or innocence upon the charge of murder, or any of them? A. I have.

"Q. Have you expressed that opinion? A. Yes.

"Q. You still entertain it? A. Yes.

"Q. You believe what you read and what you heard? A. I believe it; yes.

"Q. Is that opinion such as to prevent you from rendering an impartial verdict in the case sitting as a juror under the testimony and the law? A. I think it is."

At this stage of the examination he was "challenged for cause" for the defendants, but before any decision was made thereon the following occurred:

"Mr. *Grinnell* (for the State): If you were taken and sworn as a juror in the case, can't you determine the innocence or the guilt of the defendants

upon the proof that is presented to you here in court, regardless of your having any prejudice or opinion? A. I think I could.

"Q. You could determine their guilt or innocence upon the proof presented to you here in court, regardless of your prejudice and regardless of your opinion, and regardless of what you have read? A. Yes.

"The COURT: Do [can] you fairly and impartially try the case and render an impartial verdict upon the evidence as it may be presented here and the instructions of the court? A. Yes; I think I could."

The court thereupon overruled the challenge, but before the juror was accepted and sworn he was further examined by counsel for the defendants, as follows:

"Mr. *Foster*: I was going to ask you something about the opinion that you have formed from reading the papers and from conversation. I believe you answered me before that you had formed an opinion from reading and hearing conversation. That is correct, is it? A. Yes; but I don't believe everything I read in the newspapers.

"Q. No; but you believe enough to form an opinion? A. Yes; I formed an opinion.

"Q. Was that opinion principally from what you read in the papers, or was it from what you heard on the street? A. From what I read entirely.

"Q. Then you did believe enough of what you read to form an opinion upon the question of the guilt or innocence of these men or some of them? A. Yes.

"Q. And I believe you said you also expressed your opinion which you have formed to others with whom you conversed? A. Yes; I have expressed that opinion.

"Q. During the expression of this opinion I will ask you whether you stated in substance to these persons or any of them that you believed enough of what you had read to form the opinion which you had?

"The COURT: Did you in any conversation that you had say anything as to whether you believed or not the account which was in the newspapers which you read? A. No, sir: I never expressed an opinion in regard to whether the newspapers were correct or not.

"Q. You never discussed that matter at all? A. No, sir."

Then after some inquiries as to his business, age, and residence, the examination by the counsel for the defendants proceeded:

"Q. Are you acquainted with any members of the police force of the city of Chicago that were present at the Haymarket meeting on the occasion referred to? A. No, sir.

"Q. Have you ever had any conversation with any one that undertook to detail the facts as they occurred at the Haymarket Square, or who claimed they had been there? A. No, sir.

"Q. Is your opinion entirely made up of what you have read distinguished from what you have heard? A. Entirely from what I have read in the newspapers.

"Q. Have you had much conversation with others in regard to it at or about your place of business or elsewhere? A. We have conversed about it a number of times there in the house.

"Q. There is where you have expressed, I presume, the opinion which you have formed? A. Yes, sir.

* * * * * * *

"Q. Do you know anything about socialism, anarchism, or communism? A. No, sir; I do not.

"Q. Have you any prejudice against this class of persons? A. I think I am a little prejudiced against socialism. I don't know that I am against anarchism. In fact, I don't really understand what they are. I do not know what their principles are at all.

"Q. I understand you to say that notwithstanding the opinion you formed at the time you read the newspaper, that you now are conscious of the fact that you can try this case and settle it upon the testimony introduced here? A. Yes; I think I could.

"Q. And not be controlled or governed by any impression that you might have had heretofore? A. Yes, sir.

"Q. And the law, as given you by the court, governing it? A. Yes, sir.

"Q. In the conversations that you have had there at the store, you say you have expressed the opinion which you have formed before? A. Yes, sir.

"Q. Is that of frequent occurrence—that you have expressed the opinion you have formed? A. Well, I think I have expressed it pretty freely.

"Q. As to the number of times—as to whether it was frequent or not? A. Oh! no; we did not bring the matter up in conversation very often, but when we did we generally expressed our opinion in regard to the matter.

"Q. Your mind was made up from what you read, and you had no hesitancy in saying it—speaking it out? A. I don't think I hesitated.

"Q. Would you feel yourself any way governed or bound in listening to the testimony and determining it upon the prejudgment of the case you had expressed to others before? A. Well, that is a pretty hard question to answer.

"Q. I will ask you whether acting as a juror here you would feel in any way bound or governed by the judgment that you had expressed on the same question to others before you were taken as a juryman; do you understand that? A. I don't think I would.

"Q. That is, you have now made up your mind, or at least you have formed an opinion; you have expressed that freely to others. Now, the question is whether when you listen to the testimony you will have in your mind the expression which you have given to others and have to guard against that and be controlled by it in any way. A. No, sir; I don't think I would. I think I could try the case from the testimony regardless of this.

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"Q. I understand you to say that you believe that you can entirely lay to one side the opinion which you have formed; it would require no circumstances or evidence to overcome it if you were accepted as a juryman? A. I think I could lay aside that opinion I have formed.

"Q. You believe that you could? A. Yes."

Here the examination of the juror by the counsel for the defendants, so far as it seems to be important to the present inquiry, was closed. Then on examination by the attorney for the State the following appears:

"Q. Do you know anything of the counsel upon the other side? A. No, sir.

"Q. You have men under you assisting you in shipping? A. No; there are no men under me.

"Q. Do you belong to any labor organization? A. No, sir.

"Q. You stated, I believe, that you didn't know much about anarchism or communism, and therefore you couldn't tell whether you had a prejudice or not. A. No, sir; I do not.

"Q. But you have read something about socialism? A. Yes, sir.

"Q. Do you believe in the maintenance of the laws of the State of Illinois and the Government of the United States? A. Yes, sir; I do.

"Q. Have you any sympathy with any individual or class of individuals who have for their purpose or object the overthrow of the law by force? A. No, sir.

"Q. Have you any conscientious scruples against the infliction of the death penalty in proper cases? A. No, sir.

"Q. If taken as a juror in this case do you believe you could determine the innocence or guilt of the defendants upon the proof presented to you here in court, under the instructions of the court, regardless of everything else? A. Yes; I think I could.

"Q. You know now of no prejudice or bias that would interfere with your duties as a juror? A. No, sir.

"Q. Are you a socialist, a communist, or an anarchist? A. No, sir.

"Q. You have no associations or affiliations with that class of people, so far as you know? A. No, sir."

At the close of this examination neither party challenged the juror peremptorily, and he was accepted and sworn. It is not denied that when this occurred the defendants were still entitled to 142 peremptory challenges, or about that number.

When the juror Sanford was called he was first examined by counsel for defendants, and after some preliminary questions and answers, the examination, still by counsel for the defendants, proceeded as follows:

"Q. You know what case is on trial now, I presume? A. Yes.

"Q. Have you any opinion as to the guilt or the innocence of the defendants, or any of them, for the murder of Matthias J. Degan? A. I have.

"Q. You have an opinion; you say you have formed an opinion somewhat upon the question of the guilt or innocence of these defendants, do you mean, or that there was an offence committed at the Haymarket by the throwing of the bomb? A. Well, I would rather have you ask them one at a time.

"Q. All right. Have you an opinion as to whether or not there was an offence committed at the Haymarket meeting by the throwing of the bomb? A. Yes.

"Q. Now, from all that you have read and all that you have heard, have you an opinion as to the guilt or innocence of any of the eight defendants of the throwing of that bomb? A. Yes.

"Q. You have an opinion upon that question also? A. I have.

"Q. Did you ever sit on a jury? A. Never.

"Q. I suppose you know something about the duties of a juror? A. I presume so.

"Q. You understand, of course, that when a man is on trial, whether it be for his life or for any penal offence, that he can only be convicted upon testimony which is introduced in the presence and the hearing of the jury? You know that, don't you? A. Yes.

"Q. You know that any newspaper gossip or any street gossip has nothing to do with the matter whatever, and that the jury are to consider only the testimony which is admitted by the court actually, and then are to consider that testimony under the direction, as contained in the charge of the court; you understand that? A. Yes.

"Q. Now, if you should be selected as a juror in this case to try and determine it, do you believe that you could exercise legally the duties of a juror—that you could listen to the testimony, and all of the testimony, and the charge of the court, and after deliberation return a verdict which would be right and fair as between the defendants and the people of the State of Illinois? A. Yes, sir.

"Q. You believe that you could do that? A. Yes, sir.

"Q. You could fairly and impartially listen to the testimony that is introduced here? A. Yes.

"Q. And the charge of the court and render an impartial verdict, you believe? A. Yes.

"Q. Have you any knowledge of the principles contended for by socialists, communists, and anarchists? A. Nothing, except what I read in the papers.

"Q. Just general reading? A. Yes.

"Q. You are not a socialist, I presume, or a communist? A. No, sir.

"Q. Have you a prejudice against them from what you have read in the papers? A. Decided.

"Q. A decided prejudice against them? Do you believe that that would influence your verdict in this case, or would you try the real issue which is here, as to whether these defendants were guilty of the murder of Mr. Degan or not, or would you try the question of socialism or anarchism, which really has nothing to do with the case? A. Well, as I know so little about it in reality at present, it is a pretty hard question to answer.

"Q. You would undertake—you would attempt, of course, to try the case upon the evidence introduced here—upon the issue which is presented here? A. Yes, sir.

"Q. Now, the issue, and the only issue which will be presented to this jury, unless it is presented with some other motive than to arrive at the truth, I think is, did these men throw the bomb which killed officer Degan? If not, did they aid, abet, encourage, assist, or advise somebody else to do it? Now,

that is all there is in this case; no question of socialism or anarchism to be determined, or as to whether it is right or wrong. Now, do you believe that you can try it upon that theory and return a verdict upon that theory and upon that issue? A. Well, suppose I have an opinion in my own mind that they encouraged it?

"Q. Keep it—that they encouraged it? A. Yes.

"Q. Well then, so far as that is concerned I do not care very much what your opinion may be now, for your opinion now is made up of random conversations and from newspaper reading, as I understand? A. Yes.

"Q. That is nothing reliable. You do not regard that as being in the nature of sworn testimany at all, do you? A. No.

"Q. Now, when the testimony is introduced here and the witnesses are examined and cross-examined, you see them and look into their countenances, judge who are worthy of belief and who are not worthy of belief. Don't you think then you would be able to determine the question? A. Yes.

"Q. Regardless of any impression that you might have, or any opinion? A. Yes.

"Q. Have you any opposition to the organization by laboring men of associations, or societies or unions so far as they have reference to their own advancement and protection, and are not in violation of law? A. No, sir.

"Q. Mr. Sanford, do you know any of the members of the police force of the city of Chicago? A. Not one by name.

"Q. You are not acquainted with any one that was either injured or killed, I suppose, at the Haymarket meeting? A. No.

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"Q. Mr. Sanford, are you acquainted with any gentlemen representing the prosecution—these three gentlemen, Mr. Grinnell, Mr. Ingham, Mr. Walker, and Mr. Furthman, who not here at the present time? A. No, sir.

"Q. You are, I presume, not acquainted with any of the detective officers of the city of Chicago? A. Not to my knowledge.

"Q. Now, Mr. Sanford, if you should be selected as a juror in this case, do you believe that, regardless of all prejudice or opinion which you now have, you could listen to the legitimate testimony introduced in court and upon that and that alone render and return a fair and impartial, unprejudiced and unbiased verdict? A. Yes."

At the close of this examination on the part of the defendants, the juror was challenged in their behalf for cause, and the attorney for the State, after it was ascertained that all the peremptory challenges of the defendants had been exhausted, took up the examination of the juror; and as to this the record shows the following:

"Mr. *Ingham:* Mr. Sanford, upon what is your opinion founded—upon newspaper reports? A. Well, it is founded on the general theory and what I read in the newspapers.

"Q. And what you read in the papers? A. Yes, sir.

"Q. Have you ever talked with any one who was present at the Haymarket at the time the bomb was thrown? A. No, sir.

'Q. Have you ever talked with any one who professed, of his own knowledge, to know anything about the connection of the defendants with the throwing of that bomb? A. No.

"Q. Have you ever said to any one whether or not you believed the statements of facts in the newspapers to be true? A. I have never expressed it exactly in that way, but still I have no reason to think they were false.

"Q. Well, the question is not what your opinion of that was. The question simply is—it is a question made necessary by our statute, perhaps—— A. Well, I don't recall whether I have or not.

"Q. So far as you know, then, you never have? A. No, sir.

"Q. Do you believe that if taken as a juror you can try this case fairly and impartially, and render a verdict upon the law and the evidence? A. Yes."

At this stage of the examination the court remarked in reply to some suggestion of counsel as follows:

"The COURT. The defendants having challenged for cause, which is overruled, can, of course, stand where they are without saying anything more; but the effect of that, in my judgment, is that they accept the juror because they can't help themselves. They have got no peremptory challenge; the challenge for cause is overruled, and, necessarily, the question now is for the State to say whether they will accept this juror or not. The common law is that all jurors not challenged, or to whom the challenge is not sustained, are the jurors to try the case. If they are not challenged for a cause which is sustained, and if they are not challenged peremptorily, then they are necessarily the jury to try the case. Now, in this instance, the defendants have no more peremptory challenges, and the challenge which they have made for cause is overruled; therefore, so far as the defendants are concerned, he is a juror to try the case."

This was accepted by both parties as a true statement of the then condition of the case, and after some further examination of the juror, which elicited nothing of importance in connection with the present inquiry, no peremptory challenge having been interposed by the State, Sanford was sworn as a juror, and the panel was then complete.

This, so far as we have been advised, presents all there is in the record which this court can consider touching the challenges of these two jurors by the defendants for cause.

In *Reynolds* v. *The United States*, 98 U. S. 145, 156, we said, "that upon the trial of the issue of fact raised by" a challenge to a juror in a criminal case on the ground that he had formed and expressed an opinion as to the issues to be tried, "the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily

to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. * * * It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." If such is the degree of strictness which is required in the ordinary cases of writs of error from one court to another in the same general jurisdiction, it certainly ought not to be relaxed in a case where, as in this, the ground relied on for the reversal by this court of a judgment of the highest court of the State is, that the error complained of is so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime. We are unhesitatingly of opinion that no such case is disclosed by this record.

We come now to consider the objection that the defendant Spies was compelled by the court to be a witness against himself. He voluntarily offered himself as a witness in his own behalf, and by so doing he became bound to submit to a proper cross-examination under the law and practice in the jurisdiction where he was being tried. The complaint is, that he was required on cross-examination to state whether he had received a certain letter, which was shown, purporting to have been written by Johann Most, and addressed to him, and upon his saying that he had, the court allowed the letter to be read in evidence against him. This, it is claimed, was not proper cross-examination. It is not contended that the subject to which the cross-examination related was not pertinent to the issue to be tried, and whether a cross-examination must be confined to matters pertinent to the testimony-in-chief, or may be extended to the matters in issue, is certainly a question of State law as administered in the courts of the State, and not of Federal law.

Something was said in argument about an alleged unreasonable search and seizure of the papers and property of some of the defendants, and their use in evidence on the trial of the

case. Special reference is made in this connection to the letter of Most about which Spies was cross-examined; but we have not been referred to any part of the record in which it appears that objection was made to the use of this evidence on that account. And upon this point the Supreme Court of the State, in that part of its opinion which has been printed with the motion papers, remarks as follows:

"The objection that the letter was obtained from the defendant by an unlawful seizure is made for the first time in this court. It was not made on the trial in the court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defence should have proved that the Most letter was one of the letters illegally seized by the police and should then have moved to exclude or oppose its admission on the ground that it was obtained by such illegal seizure. This was not done, and therefore we cannot consider the constitutional question supposed to be involved."

Even if the court was wrong in saying that it did not appear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that objection was not made in the trial court to its admission on that account. To give us jurisdiction under § 709 of the Revised Statutes because of the denial by a State court of any title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was "specially set up or claimed" at the proper time and in the proper way. To be reviewable here the decision must be against the right so *set up or claimed.* As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of the waiver of a right under the Constitution, laws, or treaties of the United States, but a question of claim. If the right was set up or claimed in the proper court below the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is

concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and, therefore, no foundation is laid under this objection for the exercise of our jurisdiction.

As to the suggestion by counsel for the petitioners Spies and Fielden—Spies having been born in Germany and Fielden in Great Britain—that they have been denied by the decision of the court below rights guaranteed to them by treaties between the United States and their respective countries, it is sufficient to say that no such questions were made and decided in either of the courts below, and they cannot be raised in this court for the first time. Besides, we have not been referred to any treaty, neither are we aware of any, under which such a question could be raised.

The objection that the defendants were not actually present in the Supreme Court of the State at the time sentence was pronounced cannot be made on the record as it now stands, because on its face it shows that they were present. If this is not in accordance with the fact, the record must be corrected below, not here. It will be time enough to consider whether the objection presents a Federal question when the correction has been made.

Being of opinion, therefore, that the Federal questions presented by the counsel for the petitioners, and which they say they desire to argue, are not involved in the determination of the case as it appears on the face of the record, we deny the writ.

Petition for writ of error is dismissed.

The application made in this particular case was a last desperate attempt, so far as the courts of justice were concerned, to save the condemned anarchists from their well merited doom. The application to the Supreme Court of the United States failed, as almost every lawyer supposed would be the case. It is difficult to believe that the lawyers who made the application ever could have had any very great confidence that it would turn out otherwise; the truth of the matter being that there was really no serious ground justifying the application. Before considering the legal points involved a brief reference to the facts of the case may prove of interest.

History of the Case.—On the night of Tuesday, May 4, 1886, the anarchists of Chicago were holding a meeting in Haymarket Square, in that city, when the police ordered the crowd to quietly and peaceably disperse. One of the anarchists thereupon flung a bomb into the first rank of the police, while others of the

crowd opened on the officers with their revolvers. The result was that sixty-six members of the police force were wounded or killed in the encounter. August Spies, Michael Schwab, Oscar Neebe, Samuel Fielden, Albert R. Parsons, George Engel, Adolph Fischer, and Louis Lingg were arrested and indicted for murder. Their trial lasted from June 21 to August 20, four weeks having been consumed in the work of procuring a jury, nine hundred and eighty-one men having been called into the jury-box and sworn to answer questions.

It was the most remarkable trial ever had in this country, resulting in a conviction, which the Supreme Court of Illinois sustained.

It does not appear that any of the men who were indicted and convicted threw the bomb. The evidence tended to show that the man who did that was one Rudolph Schnaubelt. At one time the police had him under arrest, but in sifting out of the two or three hundred those whom they believed the most guilty, they had discharged this man, in ignorance of the evidence against him, and he immediately fled to Germany. While the indicted anarchists did not throw the bomb, they had advised and counseled, and incited the resort to force, as the following quotation will show:

For instance, Parsons, the editor of an anarchist paper, called *The Alarm*, had given such advice as this:

"The police and the constituted authorities are your enemies. Rise and annihilate them. The authorities will use the militia against you. You must use dynamite against them. Buy rifles and be ready to use them. If you can't buy rifles buy revolvers. If you can't buy revolvers you can buy enough dynamite for 25 cents to blow the big Pullman Building there to pieces. You know Marshall Field and George M. Pullman? Those are the people we want to blow to hell. Begin by blowing them up with dynamite. They are the enemies of the people—the men who have got rich by the sweat of your brow. Do you want clothing or food? Take it from the stores on State street. Take it all. It is yours. If any man attempts to stop you, stop him with a revolver. Who will follow me to blow the bloodsuckers of the people to hell?"

Another time he said:

"It is no use arguing. The only way to convince these capitalists and robbers is to blow them to pieces with guns and dynamite."

On the day before the massacre, Spies, who was the most influential of the anarchists, had printed in his paper, the *Arbeiter Zeitung*, the following:

"REVENGE!

"Workingmen to arms!

"The masters sent out their bloodhounds, the police. They killed six of your brothers at McCormick's this afternoon. They killed the poor wretches because they, like you, had the courage to disobey the supreme will of your bosses. They killed them because they dared ask for the shortening of the hours of toil. They killed them to show you 'free American citizens' that you must be satisfied and contented with whatever your bosses condescend to allow you or you will get killed!

"You have for years endured the most abject humiliation; you have for years suffered immeasurable iniquities; you have worked yourself to death; your children you have sacrificed to the factory lord—in short, you have been miserable and obedient servants all these years! Why? To

satisfy the insatiable greed, to fill the coffers of your lazy, thieving masters! When you ask them now to lessen your burden, he sends his bloodhounds out to shoot you—kill you! If you are men, if you are the sons of your grandsires, who have shed their blood to free you, then you will rise in your might, Hercules, and destroy the hideous monster that seeks to destroy you. To arms! we call you. To arms! Your brothers."

Fielden was addressing the Haymarket meeting at the time the police approached. The following is an extract from his remarks:

"You have nothing to do with the law except to lay hands on it and throttle it until it makes its last kick. Keep your eye upon it. Throttle it. Kill it. Stab it. * * * What matters it whether you kill yourself with work or die on the battle-field resisting the enemy? What is the difference? Any animal, however loathsome, will resist when stepped upon. Are men less than snails or worms? I have some resistance in me. I know that you have, too."

These quotations will sufficiently indicate the character of the utterances which these anarchists indulged in.

On August 20, 188[illegible], the jury brought in a verdict, finding the defendants guilty of murder, and fixing death as the penalty in the case of all but Neebe, the penalty in his case being fixed at imprisonment in the penitentiary for fifteen years. The case was carried to the Supreme Court of Illinois on a writ of error, and the judgment against them was affirmed by that court in an opinion written by Mr. Justice MAGRUDER, and filed on September 14, 1887. That opinion is a masterly one, and reflects the greatest honor on Mr. Justice MAGRUDER and the court. The voluminous character of the opinion makes its reproduction in the American Law Register impossible. But it will convince any lawyer who reads it that the defendants were a most depraved set of scoundrels, who were engaged in a devilish conspiracy to subvert the law and civil society, that they had a fair and impartial trial, and most richly deserved the fate that has at last overtaken them. It is to be hoped that the opinion of the court has taught all proclaimed enemies of society the much-needed lesson that it is not safe, even in this country, to threaten and incite bloodshed. The opinion makes the way to the gallows perfectly clear for all apostles of anarchy.

Right of the Supreme Court to Review a Criminal Case.—First. What right has the Supreme Court of the United States to review the judgment of the Federal courts in criminal cases? The laws of the United States do not provide for writs of error in criminal cases decided in the Circuit Courts of the United States. Those courts consequently exercise a final jurisdiction in criminal cases, even though life itself is at stake. While the defendant in a criminal case has no right to take his case on writ of error from the Circuit Court to the Supreme Court, yet his case may come before the latter court if the judges of the Circuit Court do not agree, and send the case up on a certificate of a division of opinion. The Acts of Congress provide that, "When any question occurs on the hearing on trial of any criminal proceeding before a Circuit Court, upon which the judges are divided in opinion, and the point upon which they disagree is certified to the Supreme Court according to law, such point shall be finally decided by the Supreme Court." Rev. Statutes, § 697 of Title XIII.

There is another way in which the Supreme Court may sometimes interfere with a judgment rendered in a criminal case. For while a writ of error does not lie to enable the court to review the judgment on the ground of error in the proceedings of the Circuit Court, yet the Supreme Court may issue a writ of *habeas corpus* and discharge a prisoner held under an erroneous judgment of the Circuit Court when it appears that that court had no jurisdiction to render the judgment. See *Ex parte Bain*, American Law Register, July, 1887, p. 433, note p. 444.

Second. What right has the Supreme Court of the United States to review a judgment of the Supreme Court of a State in a criminal case? It is clear that the United States Supreme Court cannot entertain jurisdiction to review such a judgment on the ground that a right guaranteed by the State Constitution has been violated. See *Solomons* v. *Graham*, 15 Wallace 209 (1872); *Mitchell* v. *Clark*, 110 U. S. 633 (1883). That court can only review such a judgment on the ground that some Federal question is involved, that some right guaranteed by the Constitution or laws of the United States has been violated.

Thus in *Yick Wo* v. *Hopkins*, 118 U. S. 365 (1885), the court announce: "Our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal under the laws of the State is not open to us."

The Acts of Congress provide that "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error," etc. Rev. Statutes of 1878, Title XIII, § 709.

It is to be observed that when the Supreme Court, under the provision above cited, has the right to pass in review on the judgement of a State Supreme Court, it will not review the decision except in so far as Federal questions are presented: *Presser* v. *Illinois*, 116 U. S. 252, 269 (1885).

If a Federal question is involved the writ of error can be allowed by the Chief Justice of the State Supreme Court or by any of the justices of the Supreme Court of the United States: *Bartemeyer* v. *Iowa*, 14 Wallace 27 (1871).

If the application is made to a justice of the Supreme Court of the United States, while it may be made to any of them, it seems to be understood that courtesy requires it to be made to the justice who presides in the circuit from which the case comes. Hence in the particular case the application was made to Mr. Justice HARLAN, whose circuit includes the State

of Illinois. On his suggestion the application was referred to the whole court. A like application had been similarly considered in open court in *Twitchell* v. *Commonwealth*, 7 Wallace 321 (1868).

In the opinion in the particular case the court do not dispose of the point raised by counsel as to the effect of the Fourteenth Amendment in extending to the States the limitations which were originally applicable only to the nation, as those limitations are found in the first ten articles of amendment to the Constitution. The court did not find it necessary to decide that point, inasmuch as there were no errors apparent on the record even conceding the Fourteenth Amendment to have the effect claimed for it. Should the court in some future case decide that that construction is to be given to the amendment, it will necessarily result in largely extending the jurisdiction of the court in criminal cases, to say nothing of the revolution it will work in the prevailing theory as to the power of the States.

For instance, Article V, provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." If this, by virtue of the Fourteenth Amendment, has became a limitation on State power, as well as on national, an act of a State legislature providing for trials, on informations is void, and one thus convicted would have a right to go to the Supreme Court of the United States, to protect his right to a trial as guaranteed by the fourth article. This is but one illustration, and it serves to show the sweeping change that would be effected, not merely in the jurisdiction of the Supreme Court, but in the relations existing between the States and the United States, if the construction contended for should ever be adopted. The court will no doubt soon be compelled to directly and squarely pass on this subject, and we have little idea that it will ever adopt the theory advocated by the counsel of the condemned anarchists in this case.

Inciting the Commission of Crime.—As we have already said, on the trial of the anarchists, no evidence was adduced that the defendants threw the bomb. On what principle of law, then, were they convicted of the murder for which they were indicted? Before answering the question, we may premise that the statutes of Illinois, like the statutes of so many other States have abolished the common-law distinction between principals and accessories, and all the accessories before the facts are made principals, and may be indicted and punished accordingly.

The following extracts from the opinion of the Supreme Court of Illinois will explain the principle upon which the defendants were convicted.

"If, therefore, the defendants advised, encouraged, aided or abetted the killing of Degan, they are as guilty as though they took his life with their own hands. If any of them stood by and aided, abetted, or assisted in the throwing of the bomb, those of them who did so are as guilty as though they threw it themselves."

Again. "If the defendants, as a means of bringing about the social revolution and as a part of the larger conspiracy to effect such revolution, also conspired to excite classes of workingmen in Chicago into sedition, tumult, and riot, and to the use of deadly weapons and the taking of human life, and for the purpose of producing such tumult, riot, use of weapons, and taking of life, advised

and encouraged such classes by newspaper articles and speeches to murder the authorities of the city, and a murder of a policeman resulted from such advice and encouragement, then defendants are responsible therefor."

No one will venture to question the accuracy of this statement of the law. One who persuades another to commit a crime is himself guilty of the crime if it is committed by virtue of his advice. Thus it has been held that if A persuades B to commit suicide: A is guilty of the murder of B: *Commonwealth* v. *Bowen*, 13 Mass. 356 (1816). It is there said: "The government is not bound to prove that Jewett would not have hung himself, had Bowen's counsel never reached his ear. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is, that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise. as that the counsel was received with scoff, *or* was manifestly rejected and ridiculed at the time it was given."

In *Regina* v. *Sharpe*, 3 Cox C. C. 288 (1848), Chief Justice WILDE stated the law as follows: "If persons are assembled together to the number of three or more, and speeches are made to those persons to excite and inflame them, with a view to invite them to acts of violence, and if that same meeting is so connected in point of circumstances with a subsequent riot that you cannot reasonably sever the latter from the incitement that was used, it appears to me that those who incited are guilty of the riot, although they are not actually present when it occurs. I think it is not the hand that strikes the blow or that throws the stone that is alone guilty under such circumstances, but that he who inflames people's minds and induces them by violent means to accomplish an illegal object is himself a rioter, though he takes no part in the riot. It will be a question for the jury whether the riot that took place was so connected with the inflammatory language used by the defendant that they cannot reasonably be separated by time or other circumstances." In this case the defendant was indicted for sedition and riot. He had addressed a large assembly of persons, using very exciting and inflammatory language. Shortly afterwards a large crowd moved towards a church, in which several policemen had been stationed, and began throwing stones and conducted themselves in a violent manner. And to the same effect are the text writers, "if one purposely excites another to commit an offence, as if he harangues people, inflaming them to riot, and the offence is accordingly committed, he is guilty, though he personally takes no part in it:" 1 Bishop's Cr. Law 640.

"Every one who incites any person to commit any crime commits a misdemeanor whether the crime is committed or not." Stephens' Digest of Criminal Law, Art. 47.

An Impartial Jury.—What is an "impartial" jury in the sense in which the term is used in the Constitution? Before considering this question, we shall refer to the subject of challenges, by which the right to an impartial jury may be asserted. The counsel for the anarchists claimed that the trial jury was not "impartial" in the constitutional sense, and that they were prejudiced by the ruling as to their challenges. It appears that under the laws of Illinois each one of the eight anarchists was entitled to a peremptory challenge of twenty jurors, making the whole number allowed to the defence one hundred and sixty. Of those called into the jury box, seven hundred and fifty-sev-

en were excused upon challenge for cause, and one hundred and sixty were challenged peremptorily by the defence and fifty-two by the State. Of the twelve jurors finally selected, eleven were accepted by the defendants. Before the twelfth juror was taken the defendants had exhausted their peremptory challenges, and he was challenged for cause and the challenge overruled. The claim was asserted before the Supreme Court of Illinois that their peremptory challenges having been exhausted before the panel was finally completed, the court should review the action of the trial court in those cases where challenges for cause were overruled, thus compelling the defence to exercise their peremptory challenges. The Supreme Court of Illinois, however, held otherwise, and declared that it must be made to appear that an objectionable juror was put on the defendants after they had exhausted their peremptory challenges. This ruling accords with the opinion which the Supreme Court of the United States had previously expressed in *Hopt* v. *Utah*, 120 U. S. 430 (1877), and in *Hayes* v. *Missouri*, Id. 71 (1877) and which is reiterated in the particular case. And see to the same effect: *Loggins* v. *The State*, 12 Texas Ct. of App. 65 (1882); *Holt* v. *State*, 9 Texas Ct. of App. 571 (1880); *Bean* v. *State*, 17 Texas Ct. of App. 60 (1884); *Steagald* v. *State*, 22 Texas Ct. of App. 488 (1886); *Benton* v. *State*, 30 Ark. 328 (1875); *People* v. *McGungill*, 41 Cal. 430 (1871); *State* v. *Simmons*, 38 La. Ann. 41 (1886); *State* v. *Drake*, 33 Kans. 151 (1885); *Collins* v. *People*, 103 Ill. 21 (1882); *State* v. *Smith*, 49 Conn. 379 (1881); *State* v. *Hoyt*, 47 Conn. 529 (1880); *People* v. *Carpenter* 102 N. Y. 238 (1886); *Mimms* v. *State*, 16 Ohio St. 221 (1865); *Irwin* v. *State*, 29 Ohio St. 186 (1876); *Hartnet* v. *State*, 42 Ohio St. 578 (1885); *State* v. *Gooch*, 94 N. C. 987 (1886); *People* v. *Weil*, 40 Cal. 268 (1870); *State* v. *Brown*, 15 Kans. 400 (1875); *Preswood* v. *State*, 3 Heisk. (Tenn.) 468 (1872); *Stewart* v. *State*, 13 Ark. 742 (1853); *Morton* v. *State*, 1 Kans. 468 (1863); *McGowan* v. *State*, 9 Yerger (Tenn.) 184 (1836); *Alfred* v. *State*, 2 Swan (Tenn.) 581 (1853); *Ogle* v. *State*, 33 Miss. 383 (1857); *Robinson* v. *Randall*, 82 Ill. 521 (1876).

A case must needs lean on a pretty slender reed which at this day depends for a new trial, on the fact that a challenge for cause was improperly overruled, when the peremptory challenges were not exhausted. There is no ground of complaint in such cases except as to jurors improperly received after the peremptory challenges have been exhausted.

Now, inasmuch as this right of peremptory challenge is the right to reject and not to select jurors, if one of two defendants peremptorily challenges a juror, and the other defendant insists that he is qualified, the juror should nevertheless be excluded: *State* v. *Mzaker*, 54 Vermont 112 (1881). And because the right of peremptory challenge is the right to reject and not to select, the ruling of the trial judge in rejecting a juror challenged for cause by the State, affords, of itself, no legal ground of complaint to the defendant: *State* v. *Creech*, 38 La. Ann. 480 (1886).

If there are several defendants, each of them is entitled to the statutory number of peremptory challenges, but unless the statute expressly provides otherwise the State will only have the same number it would have if there was only a single defendant: *Schoeffler* v. *State*, 3 Wis. 839 (1854); *Wiggins* v. *State*, 1 Lea (Tenn.) 738 (1878). And see *Smith* v. *State*, 57 Miss. 822 (1880). In the Wisconsin case explaining the

reason for thus restricting the State's right of challenge in a trial of joint defendants, it says that if the statute should be so construed as to allow the prosecuting officer the statutory number of challenges for each defendant, he could multiply such challenges indefinitely by simply increasing the number of defendants, and that such a construction might defeat the very object and intent of this statute. In Illinois the statutes provide that "every person arraigned for any crime punishable with death or imprisonment in the penitentiary for life shall be admitted on his trial to a peremptory challenge of twenty jurors, and no more;" * * * "and that the attorney prosecuting on behalf of the people shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to:" Rev. Stat. of Illinois, 1885, p. 443, § 432. Under this statute there being eight defendants, in this particular case, the State was considered to be entitled to one hundred and sixty peremptory challenges. The addition of several counts to an indictment does not enlarge the number of challenges: *Commonwealth* v. *Walsh*, 124 Mass. 32 (1878).

Can the court exclude a juror on its own motion? In *State* v. *Ring*, 29 Minn. 78, 81 (1882), the court excluded on its own motion a juror on the ground of general disqualification. No challenge for cause had been made, and the defendant took an exception. The right of the court to do this was sustained, the Supreme Court of Minnesota saying: "It is the duty of the court to supervise, and within proper limits to control, the trial of causes before it, to the end that justice may be administered in reality as well as in form. The parties before the court might desire, from different motives, to accept an incompetent juror—one entirely unacquainted with our language; but the court is not required to yield its assent to such a proceeding, or take part in such a trial. The parties have the right to challenge for general disqualification; but their neglect to avail themselves of that privilege does not prevent the court from inquiring as to the capacity of a juror to discharge intelligently the duties of his place." In *Greer* v. *State*, 14 Texas Ct. of App. 181 (1883), it is announced that a court has no right on its own motion to stand aside a juror acceptable to both parties, unless the juror is one absolutely prohibited by law from sitting as a juror.

It is held that the right of peremptory challenge can be exercised so long as the jury has not been sworn, and notwithstanding a previous declaration of the party challenging that he is satisfied with the jury: *Jhons* v. *People*, 25 Mich. 500 (1872); *Hamper's Appeal*, 51 Id. 71 (1883). But the right cannot be exercised after the jury is sworn: *People* v. *Dolan*, 51 Mich. 610 (1883).

In *Hayes* v. *Missouri*, *supra*, the Supreme Court of the United States sustained the constitutionality of a State statute providing that in capital cases, in cities having a population of over one hundred thousand inhabitants, the State shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the State it is allowed eight peremptory challenges in such cases. This was held not to violate the Fourteenth Amendment to the Constitution. The following extract from the opinion in that case will prove of interest: "Originally, by the common law, the crown could challenge peremptorily without limitation as to number. By Act of Parliament, passed in the time of Edward I, the right to challenge was

restricted to challenges for cause. But, by a rule of court, the crown was not obliged to show cause until the whole panel was called. If, when the panel was through, a full jury was obtained, it was taken for the trial. If, however, a full jury was not obtained, the crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them."

That a jury should be "impartial" requires that the jurors should be free from all bias for or against the accused. And this leads us to inquire what opinions disqualify a juror on the ground that he is not impartial in the constitutional sense? There can be no doubt but that the rule laid down by the Supreme Court of Illinois, and which is sanctioned by the Supreme Court of the United States in this particular case, is almost everywhere recognized at the present day as laying down the correct test by which the competency of a juryman is to be determined, who has an opinion based on newspaper statements. It is quite a common thing for counsel to propound to a juror the question whether he has such an opinion as will require evidence to change it. But, while some courts seem to recognize this as a test, the overwhelming weight of authority does not regard it as a proper test, as no rational person ever has an opinion on any subject which is changed or unmoved except by evidence of some kind. Such a juror is competent if he states that he can fairly and impartially render a verdict in accordance with the law and the evidence. The following cases pass on this question where the opinion is based on newspaper statements: *People* v. *Brown*, 59 Cal. 346 (1881); *Jones* v. *People*, 6 Col. 456 (1882); *State* v. *Hoyt*, 47 Conn. 530 (1880); *Montague* v. *State*, 17 Fla. 662 (1880); *Duyle* v. *State*, 100 Ind. 259 (1884); *Wilson* v. *People*, 94 Ill. 299 (1880); *State* v. *Spaulding*, 24 Kans. 1 (1880); *State* v. *Ford*, 37 La. Ann. 444 (1885); *Commonwealth* v. *Webster*, 5 Cush. (Mass.) 295, 297 (1850); *Waters* v. *State*, 51 Md. 430 (1879); *White* v. *State*, 52 Miss. 216, 221 (1876); *Ulrich* v. *People*, 39 Mich. 245 (1878); *State* v. *Wilson*, 85 Mo. 134 (1884); *Bohanan* v. *State*, 18 Nebraska 57 (1885); *State* v. *Carrick*, 16 Nevada 120, 126 (1881); *State* v. *Pike*, 49 N. H. 399, 407 (1870); *State* v. *Fox*, 25 N. J. Law 566, 587 (1856); *People* v. *Buddensieck*, 103 N. Y. 487 (1886); *State* v. *Collins*, 70 N. C. 241, 243 (1874); *McHugh* v. *State*, 42 Ohio St. 154 (1884); *Traviss* v. *Commonwealth*, 106 Pa. St. 597 (1884); *State* v. *Dodson*, 16 S. C. (N. S.) 453 (1881); *Spence* v. *State*, 15 Lea (Tenn.) 539 (1885); *Kennedy* v. *State*, 19 Tex. Ct. of App. 618 (1885); *State* v. *Meyer*, 58 Vt. 457 (1886); *Dejarnette's Case*, 75 Va. 867 (1881); *State* v. *Schnelle*, 24 W. Va. 779 (1884). When the opinion is based on having heard or read evidence given on a former trial, see *Pierson* v. *State*, 21 Texas Ct. of App. 57 (1886); *Thompson* v. *State*, 19 Texas Ct. of App. 594 (1885); *Wade* v. *State*, 12 Texas Ct. of App. 358 (1882); *Marion* v. *State*, 20 Nebraska 233 (1886); *State* v. *Culler*, 82 Mo. 623 (1884); *Benton* v. *State*, 30 Ark. 343 (1875). When the opinion is based on rumors, see *Jackson* v. *State*, 77 Ala. 23 (1884); *Casey* v. *State*, 37 Ark. 83 (1881); *State* v. *McGee*, 36 La. Ann. 206 (1884); *State* v. *Anderson*, 5 Harr. (Del.) 493 (1854); *State* v. *Reed*, 89 Mo. 168 (1886); *State* v. *Green*, 95 N. C. 611 (1886); *Conatser* v. *State*, 12 Lea (Tenn.) 436 (1883); *Schoeffler* v. *State*, 3 Wis. 833 (1854); *Hutchinson* v. *State*, 19 Nebraska 262 (1886); *State* v. *Boyd*, 38 La. Ann.

374 (1886). When the opinion is based on conversation with witness, see *Penn* v. *State*, 62 Miss. 450 (1884); *Walker* v. *State*, 102 Ind. 502 (1885). When the juror has conscientious scruples against capital punishment, see *Smith* v. *State*, 55 Miss. 411 (1877); *Harrison* v. *State*, 79 Ala. 29 (1885); *Stephenson* v. *State*, 110 Ind. 358 (1886); *Jones* v. *People*, 6 Col. 452 (1882); *Stratton* v. *People*, 5 Col. 276 (1880); *Coleman* v. *State*, 59 Miss. 484 (1882); *Spain* v. *State*, 59 Miss. 19 (1881); *State* v. *Leabo*, 89 Mo. 247 (1886); *State* v. *Hing*, 16 Nev. 307 (1881). In *Thompson* v. *State*, 19 Texas Ct. of App. 594 (1885), it is held that when a juror has conscientious scruples against the death penalty he is disqualified, although the statute fixes the penalty at death or imprisonment for life.

In *Hutchinson* v. *State*, 19 Nebraska 262 (1886), it is held that unfriendly feeling towards the attorney does not constitute ground for a challenge for cause.

In *Boyle* v. *People*, 4 Col. 176 (1878), it is held that the members of an association formed to check a certain crime, are not *per se* incompetent as jurors in a trial of one accused of such crime, but that the judge is invested with discretion in such cases. In *Commonwealth* v. *Moore*, 143 Mass. 136 (1886), a juror was held incompetent who belonged to a Law and Order League which employed the complaining witness to enforce the law and prosecute offenders. In *Stoots* v. *State*, 108 Ind. 415 (1886), it is held that a juror is incompetent who admits that he would allow less weight and credit to the testimony of the defendant, if he should testify in his own behalf, than he would if such defendant were not engaged in the business of selling liquor. In *Carrow* v. *People*, 113 Ill. 550 (1885), it is held to be no legal objection to the competency of a juror that he does not approve of selling liquor with or without a license.

We cannot refrain from adding in conclusion, that while all may regret the necessity of ever sacrificing human life, there has rarely, if ever, been a case in all our history where the necessity of doing it was as great as in the present instance. We can have but little patience with men who, having fled from foreign oppression, and the hard conditions of society in the Old World, to enjoy the beneficent conditions of life in the New, under a government more considerate of the conditions of the poor than any government the world has known, turn upon us and preach the subversion of human government by the use of the assassin's dagger, dynamite, and the torch. Such men are ingrates and idiots, and worse. They are the greatest criminals that walk the earth, and thanks to the courts and to the governor of Illinois in this case it has been revealed that the "velvet glove of Liberty incases the merciless hand of the law."

HENRY WADE ROGERS.

Supreme Court of Indiana.

ROGERS *et al. v.* UNION CENT. LIFE INS. CO.

If a complaint shows the plaintiff entitled to part of the relief demanded, it will be good on demurrer.

A married woman, who represents that she is executing a mortgage to secure money for her own use is estopped, as against one who in good faith, and after diligent inquiry, relies on such representations, from averring that she executed the mortgage as surety for her husband.

APPEAL from Superior Court, Vigo county.

McNutt & McNutt and *Pierce & Davis*, for appellants.

H. B. Jones, for appellee.

The opinion of the court was delivered by

ELLIOTT, J.—The appellee's complaint is founded upon promissory notes executed by Mary Jane Rogers, and a mortgage securing them executed by her and her husband, Newton Rogers. The complaint is attacked by the assignment of errors jointly made by the appellants, and, as the complaint is certainly good as to one of them, the attack must fail even if it were conceded that it was bad as to one of them. It is well settled that a joint assignment of errors will not prevail if the complaint is good as to one of the appellants: *Hoes* v. *Boyer*, 108 Ind. 494; *Hochstedler* v. *Hochstedler*, 108 Ind. 506. We need not, therefore, inquire whether the complaint is bad as to one of the appellants, for, if we find it good as to either, we must hold the attack upon it to be unavailing.

The only points made against the complaint which affects both appellants are that it fails to aver that the notes are due and unpaid, and also fails to show to whom the notes are payable. The second point is based on a misapprehension of the record, for the notes filed with the complaint show who the payee is, and it is also shown in the body of the pleading that the appellee is the payee of the notes. The first point is not well taken, because, as to some of the notes, it is distinctly averred that they are due and unpaid, and this would entitle the plaintiff to some part, at least, of the relief demanded. It is well settled that a complaint which shows the plaintiff enti-

tled to some relief will repel a demurrer: *Bayless* v. *Glenn*, 72 Ind. 5. But we think the complaint shows by fair implication that all of the notes were due and unpaid, and this is certainly sufficient after verdict.

Mary J. Rogers alleges, in her separate answer, that at the time she executed the notes and mortgage she was a married woman and the owner of the property mortgaged; that she executed the notes and mortgage as surety for her husband, and for no other consideration. The appellee replied to this answer in six paragraphs. To the third, fourth, fifth, and sixth paragraphs of this reply the appellant demurred. The demurrers were not, however, addressed to each paragraph of the reply, but to all the paragraphs collectively. If any one of these paragraphs was good, there was no error in overruling the demurrer.

We think that some of the paragraphs were good. The facts pleaded show that the appellee was informed by Mrs. Rogers that the money she sought to obtain was for her own benefit; that she was not undertaking as the surety of her husband; that the appellee believed her statements, and, relying on their truth, loaned her the money she desired; and they show also, that the appellee rightfully relied on her representations. Our decisions establish the rule that a married woman may estop herself by her conduct from denying that a loan effected by her was for her benefit. As said in *Orr* v. *White*, 106 Ind. 341: "She may now be bound by an estoppel *in pais* like any other person." This has been expressly ruled in other cases: *Vogel* v. *Leichner*, 102 Ind. 55; *Gupp* v. *Campbell*, 103 Ind. 213; *Ward* v. *Berkshire Life Ins. Co.*, 108 Ind. 301. In the case last cited the facts were very similar to those pleaded in the reply before us, and, after a full discussion of the question, it was held that the married woman was estopped to deny that the money was obtained for her own benefit. We did not hold in that case that the form or recitals of the contract will work an estoppel, nor do we so hold in this. What we hold is that by her conduct and representations, relied upon by one who contracted with her in good faith, she is estopped to deny the character of her contract. If the party with whom she contracts does not act in good faith, or if he knows or has the means of ascertaining the truth, he cannot successfully insist

upon an estoppel. But the presumption is against bad faith, and until the contrary appears that presumption must prevail.

We think that we were right in holding that, where it appears that the disability of coverture exists, it devolves upon the party seeking the judgment to show that the contract was one which the married woman had capacity to make: *Vogel* v. *Leichner, supra; Cupp* v. *Campbell, supra.* But this does not prevent the party from showing that he relied upon the conduct of the married woman. It would be a fraud which she will not be allowed to perpetrate for her to repudiate her representations as against one who has in good faith relied upon them. Our decisions all recognize the rule that, under the provisions of the Act of 1881, a married woman may be estopped, and that when she attempts to deny what she has previously affirmed, she is guilty of a legal fraud. Upon the admitted facts stated in the reply, the appellant, Mary J. Rogers, was estopped to deny the character of the contract into which she entered.

There was no error in refusing a jury trial. The suit was of equitable cognizance, and the whole issue became one for the Chancellor, and not for the jury; *Carmichael* v. *Adams,* 91 Ind. 526; *Field* v. *Holzman,* 93 Ind. 205; *Quarl* v. *Abbett,* 102 Ind. 233–239; *Brown* v. *Russell,* 105 Ind. 46, and cases cited.

It is contended that the judgment should be reversed because the bill of exceptions does not show that any evidence was given, but does show that testimony was offered. The appellants take a very erroneous view of the subject. Upon them rests the burden of showing error in the record, and if all the evidence was necessary to show this, it was for them to bring it into the record. If the evidence is not all in the record, the presumption that the trial court did right will prevail. If the bill of exceptions is defective, the appellants must suffer, and not the appellee. Judgment affirmed.

The only question of general interest involved in this case is, whether and how the doctrine of estoppel is applied to a married woman? Estoppel is where a person *sui juris,* by words or conduct intentionally causes another to believe in the existence of certain facts, which induces him to act on that belief, so as to alter his previous condition, the former is estopped from averring against the latter a different state of facts as existing at the same time: 1 Saund. 326; *Pickard* v. *Sears,* 6 A. & E. 469; 2 Nev. & P.

488; *Malloney* v. *Horan*, 49 N. Y. 111; *Anthony* v. *Stephens*, 46 Ga. 241; *Cady* v. *Owen*, 34 Vt. 598; *Lyman* v. *Cessford*, 15 Iowa 229. And such estoppel operates only in favor of parties affected, and not in favor of those upon whom it had no influence: *Whedon* v. *Champlin*, 59 Barb. 62; *Crenshaw* v. *Creek*, 52 Mo. 98; *Malony* v. *Horan*, 49 N. Y. 111; *Guthrie* v. *Howard*, 32 Iowa 54; *McDaniel* v. *Carver*, 40 Ind. 250; *Van Metre* v. *Wolf*, 27 Iowa 341.

It may be affirmed that the full doctrine of estoppel has not been applied to a married woman, because she is more or less under certain disabilities and is not in fact *sui juris*: *Stephenson* v. *Osborne*, 41 Miss. 119; *Lowell* v. *Daniels*, 2 Gray 161; *Keen* v. *Hartman*, 12 Wright (Pa.) 497; *Keen* v. *Coleman*, 3 Id. 299; *Martin* v. *Martin*, 22 Ala. 86; *Lothrop* v. *Foster*, 51 Me. 367; *Burns* v. *Lynde*, 6 Allen 305; *Towles* v. *Fisher*, 77 N. C. 443; *Lyman* v. *Cessford*, 15 Iowa 233. Hence, as a married woman had no capacity to make a contract at common law, any attempted or *quasi* contract she might enter into were void, and did not create an estoppel: *Glidden* v. *Strupler*, 2 P. F. Sm. 400; *Plumer* v. *Lord*, 5 Allen 460; *Davenport* v. *Nelson*, 4 Camp. 25; *Bodine* v. *Killeen*, 53 N. Y. 93; *Todd* v. *Railroad*, 19 Ohio St. 514; for the very good reason that if she could bind herself by way of estoppel, this would destroy her incapacity to contract at common law and present the contradictions, that although at common law a married woman cannot enter into a contract, yet she can make such contract by way of estoppel. The statutory enactments changing the common law with respect to married women enlarged her capacity to contract and carried with it the doctrine of estoppel in proportion to the enlargement of her power to contract and other *sui juris* powers: *Richardson* v. *Hittle*, 31 Ind. 119; *Wilbeck* v. *Wilbeck*, 25 Mich. 439; *Reagan* v. *Holliman*, 34 Tex. 403; *Hoxie* v. *Price*, 31 Wis. 82; *Canty* v. *Sanderford*, 37 Ala. 91; *In re Lush's Trust*, L. R., 4 Ch. Ap. 591; *Drake* v. *Glover*, 30 Ala. 382; *Palmer* v. *Cross*, 1 Sm. & M. 48; *Towlers* v. *Fisher*, 77 N. C. 443; *Lyman* v. *Cessford*, 15 Iowa 233; *Schwartz* v. *Saunders*, 46 Ill. 18; *Coal Co.* v. *Pasco*, 79 Id. 170; *Sharpe* v. *Foy*, L. R., 4 Ch. Ap. 35; *Jones* v. *Frost*, L. R., 7 Ch. Ap. 773; *contra*, *Bemis* v. *Call.*, 10 Allen 512; *Palmer* v. *Cross*, 1 Sm. & M. 48; *Rangeley* v. *Spring*, 21 Me. 130. In proportion, therefore, as the enabling statutes have removed a married woman's disabilities under the common law, so her capacity to be bound by estoppel is also enlarged; and conversely, in proportion as the common law disabilities remain, or *exist*, so also the doctrine of estoppel does not operate, and does not apply: *Bodine* v. *Killeen*, 53 N. Y. 93; *Lyman* v. *Cessford*, 15 Iowa 229; *Grove* v. *Jeager*, 60 Ill. 249; *Schwartz* v. *Saunders*, 46 Id. 18; hence, acts which before the enabling statute would not have bound a married woman by way of estoppel may do so now, under these statutes, upon the principle above stated: *Lyman* v. *Cessford*, *supra*; *Grove* v. *Jeager*, *supra*; *Upshaw* v. *Gibson*, 53 Miss. 344. But as there are no enabling statutes which make a married woman *sui juris* in every respect without qualification or limitation, and as a married woman can only contract with respect to her separate estate, the law of estoppel can only attach to that separate estate directly or indirectly: *Wood* v. *Terry*, 30 Ark. 393.

The doctrine of estoppel as applied under the enabling statutes to the acts of a married woman arises out of, and has its origin in, fraud—some affirma-

tive act of fraud, upon which a prudent person might and did rely to his injury: *Towles* v. *Fisher*, 77 N. C. 443; *Schwartz* v. *Saunders*, 46 Ill. 18; *Sharpe* v. *Foy*, L. R., 4 Ch. Ap. 35; *Jones* v. *Frost*, L. R., 7 Ch. Ap. 773; not a silent or passive act, such as mere silence in regard to her rights: *U. S. Bank* v. *Lee*, 13 Pet. 118; *Palmer* v. *Cross*, 1 Sm. & M. 68; *Drake* v. *Glover*, 30 Ala. 382; *Havener* v. *Godfrey*, 3 W. Va. 426; *contra*, *Lindner* v. *Sahler*, 51 Barb. 322; *Carpenter* v. *Carpenter*, 10 C. E. Green 194, but a positive, active, fraudulent act or statement: *Ainsley* v. *Mead*, 3 Lans. 116; *Westgate* v. *Munroe*, 100 Mass. 227; such as where she made a sworn disclaimer of ownership: *Cooley* v. *Steele*, 2 Head 605; *Lathrop* v. *Association*, 45 Ga. 483; *Cravens* v. *Booth*, 8 Tex. 243; or where she announced at the sale of her husband's real estate that she would not claim dower, and the purchasers, relying upon her statement, made the purchase: *Connolly* v. *Branstler*, 3 Bush 702; or her false recitals in her deed: *Jones* v. *Frost*, L. R., 7 Ch. Ap. 773; or her active connivance in her husband's fraud, produced by her loaning her credit for that fraudulent purpose: *Anderson* v. *Armstead*, 69 Ill. 456; *Bodine* v. *Killeen*, 53 N. Y. 93; *Anderson* v. *O'Rielly*, 54 Barb. 620; or knowingly permitting her husband to obtain credit on the faith of property which in truth belongs to her: *Besson* v. *Eveland*, 11 C. E. Green 471; *Zimmer* v. *Dansby*, 56 Ga. 79. See *Dayton* v. *Fisher*, 34 Ind. 356.

A married woman can only be divested of her separate estate in the method and manner prescribed by the law: *Morrison* v. *Wilson*, 13 Cala. 498; *McIntosh* v. *Smith*, 2 La. Ann. 758; *Bisland* v. *Provasty*, 14 La. Ann. 169; and as estoppel applies to executed, not executory, contracts of a married woman, every contract which she, by false representations, induces another to enter into with herself, is not an estoppel: *Keen* v. *Hartman*, 12 Wright (Pa.) 497; *Keen* v. *Coleman*, 3 Id. 299; *Lowell* v. *Daniels*, 2 Gray 161. It depends upon the line of demarkation above stated, and containing in some degree the elements of fraud, and injury or damage to another: *Sexton* v. *Wheaton*, 8 Wheat. 238; *Lane* v. *Berry*, 2 Duv. 282; *Mounger* v. *Duke*, 53 Ga. 281; *Brown* v. *Kimbrough*, 51 Ga 35.

The general rule is that in proportion as a married woman's disabilities at common law are removed by the enabling statutes, she is within that degree bound by estoppel *in pais* like any person *sui juris*.

JOHN F. KELLY.

Bellaire, Ohio.

Court of Appeals of Kentucky.

WHEAT v. BANK OF LOUISVILLE.

The appellee, a banking corporation, was a creditor to a large amount of the firm of W. & D., and its president, without express authority, and without advising the directors, agreed to a composition between the firm and its creditors. The directors held meetings between the time of the failure of W. & D. and the proposal of a composition, and also between the time of the proposal and the time of the acceptance of the composition. The board took no action in the matter, but at its meetings each member had expressed oppcsi-

tion to a compromise. There was no evidence of any custom of the president to act in such matters. *Held*, that the action of its president was not binding on the appellee.

In order that the circumstances of a particular case may be sufficient to raise a presumption of authority in a bank president to bind the bank in matters beyond the scope of his usual authority, the bank must in some manner be a party to the circumstances, or must be chargeable with knowledge of them.

Where an answer, in setting up an agreement with a bank, merely averred that the bank was represented by its president, but did not aver any authority in the president to represent or bind the bank, and the reply denied the alleged agreement, but did not aver that the president had no authority to act for it, *held*, that the authority of the president was in issue.

APPEAL from Louisville Chancery Court.

Chas. H. Gibson, for appellant.

Hamilton Payne and *Wm. Lindsay*, for appellee.

HOLT, J.—Wheat & Durff, doing business as merchants, made an assignment for the benefit of their creditors. The trustee instituted this action to settle the trust. The appellee, the Bank of Louisville, having been made a defendant, asserted a considerable indebtedness against the firm, and made its answer a cross-petition against its members. The appellant, John L. Wheat, alone filed an answer to it. He does not deny the indebtedness, but avers that shortly after the failure the creditors, at a creditors' meeting, agreed with Wheat & Durff and each other to accept fifty per centum of their claims in full discharge thereof; and that the bank so agreed, being represented at the meeting by its president. The answer further avers, as the indebtedness of the firm to the bank was evidenced by paper which it had indorsed to it, and upon which other parties were previously liable, that, subsequent to the making of the composition agreement, it was further agreed between Wheat & Durff and the bank that the latter should collect the indebtedness so far as possible from those first liable therefor, and when no more could be collected, that then Wheat & Durff should pay to the bank fifty per centum of the amount uncollected, and in consideration thereof be discharged from all further liability. The bank by a reply denies that it ever made either agreement; and it is now insisted that, inasmuch as it does not aver that its

president had no authority to act for it at the creditors' meetings, this must be taken as *pro confesso*, and his action considered as its action. The answer, however, does not aver that the appellee's president had authority to agree to the composition, but merely says that the bank was represented at the two creditors' meetings by its president, without averring that he was authorized to so represent it, and that the bank agreed to the settlement. Upon this state of pleading the authority of its president to bind it by any such agreement must be regarded as in issue.

The evidence is somewhat conflicting as to whether all of the creditors present at the creditors' meeting, or the president of the bank, did then agree to the composition. The decided burden of the testimony, however, supports this view, and we think it may be safely so assumed. The appellant testifies that the second agreement above named was made with the appellee's president alone, so that, when the appellant now urges that the bank's recovery should be confined to a sum equal to fifty per centum of its debt, the question arises whether it is bound by the action of its president as above indicated. If it be answered in the negative, then it will be necessary to consider the other questions that have been ably presented in argument. The charter of the bank gives him no such power. It provides that the administration of its affairs shall be under the control of a board of directors. It is conceded in argument, upon the part of the appellant, that he had no express authority to so bind the bank, and that he never advised its board of any such action by him. Neither is it contended that he, *virtute officii* merely, could compromise or release its debt. If he had such power, it must be traced to the assent of the board of directors, either express or implied. In truth, the position of president of a bank is one of dignity rather than power. There is an indefinite general responsibility attached to the place. He is expected to watch more closely the daily transactions of the bank than the other directors; and while they, or usage, may confer upon him special powers, and extend his authority, yet that inherent in the position is very slight. Indeed, it seems by judicial decision to be confined to taking charge of the litigation of the bank. Mr. Moore says: "The same species of limitation in the power of the president

forbids him to surrender or release claims of the bank against any person, from whatsoever source arising, or to stay the collection of an execution against the estate of a judgment debtor. For either of these acts is the exercise of a discretionary authority over the affairs and property of the bank, which is the peculiar and exclusive province of the directors." Moore, Banks and Banking, 133. This is the general rule; and undoubtedly he has no power by virtue of his office to bind the bank in an unusual manner, or in any undertaking outside of its customary routine of business. No authority goes beyond this line. It was held in *Smith* v. *Lawson*, 18 W. Va. 212, that the president of a bank could not transfer or assign a note belonging to it; in *Olney* v. *Chadsey*, 7 R. I. 224, that he could not surrender the securities held by his bank to secure a debt; in *Hodge's Ex'r* v. *Bank*, 22 Grat. 51, that he had no right to release a debt owing to his bank; and in the case of *Bank* v. *Dunn*, 6 Pet. 51, that his agreement that the indorser upon a note should not be liable was not binding upon the bank.

It is contended, however, that the president of the appellee acted under such circumstances as to raise the presumption that he was empowered by it to so act; and that, third parties being therefore equitably entitled to rely upon his representations, the law will presume the authority, and hold the bank bound by his action, if not *ultra vires*, although in point of fact he had no such authority, or was even acting in violation of the instructions of its board of directors. The bank must, however, in some way be a party to such circumstances, or chargeable with notice or knowledge of them, in order to so hold; and this record fails to exhibit such a state of case. It is true that the appellee's debt was a large one, and its directors were therefore likely to watch closely whatever steps were taken looking to its payment, or the settlement of the trust estate. They held several meetings between the time of the failure of Wheat & Durff and the first creditors' meeting, when the composition was proposed; and also between such first meeting and the second one, when it was accepted. They probably knew their president attended these meetings; but these circumstances did not, in our opinion, authorize third parties to presume that they had given the president unlimited authority in the matter, or the power to

agree to a composition of the debt. In fact, the evidence shows that while no vote had been taken in the board of directors, yet each member had at its meetings expressed himself as opposed to accepting anything less than the full amount of it. The president of a corporation may without express authority perform all acts which are properly incident to the trust reposed in him, or which necessity or custom may impose upon the office. The release or composition of a debt due to a bank, however, is a matter peculiarly within the province of its directory. If there be any matter which more than any other falls within the scope of their duty, it is this one, because it not only affects the prosperity of the institution, but may involve its very existence. Necessity does not require the president to exercise his judgment alone as to it; indeed, the proper management of a bank dictates that he should not do so, and it is not, therfore, a matter incident to the performance of his duty. There is no evidence whatever in this record that it had been customary for the president of the appellee to control such matters, or to agree to the release or composition of the debts of the bank, without express authority from its directory, and we fail to see upon what ground third parties had an equitable right to believe that he had such power. If he had been in the habit of doing so by the consent or with the knowledge of the directors of the bank, or if they by act or conduct had held him out to the public as authorized to do so, then a proper policy, as well as common justice to third parties dealing with him in good faith, would estop the appellee from now denying his authority. It not having done so, and having in no way authorized, recognized, or ratified his action, it is not bound by it; and the judgment below for the entire debt must therefore be, and is, affirmed.

The principles of the law as to the powers of a bank president are stated by the court in the preceding case in conformity with the text-books on that subject: Morse, Banks and Banking 143 *et seq.*; Morawetz, Private Corporations, §§ 537, 538. Perhaps the most concise, and at the same time a not inaccurate summary of them, would be to say that the law regards this officer as the president of the board of directors, rather than as the president of the *bank*. In very many banking institutions (and formerly, perhaps, more generally than to-day) this would be a correct description of his position; but in the great financial institutions of the country of which the management as well as the general policy is directed by the

president, it is scarcely accurate. Yet there does not appear to be any tendency on the part of the courts to modify the rule of the earlier decisions, and in dealings with a bank the law says that the authority of the president to bind the institution, either in the particular instance or in general, must be shown in something more than his mere occupancy of the position of president.

It is stated, indeed, by the text writers that one thing the president can do, and by his acting therein bind the bank. "This solitary function is to take charge of the litigation of the bank. There is no question that this matter belongs to him by virtue of his office. * * * Counsel requested by him to act for the bank will bind it by their action in the case, within the ordinary powers of counsel, by sole authority of their engagement by him. Nor will it make any difference, though circumstances render that engagement originally wrong or improper." Morse, Bank and Banking 144, citing, *Savings Bank of Cincinnati* v. *Benton*, 2 Metc. (Ky.) 240; *American Ins. Co.* v. *Oakley*, 9 Paige 496; *Mumford* v. *Hawkins*, 5 Denio 355; *Oakley* v. *Workingmen's Benevolent Society*, 2 Hilt. 487; *Alexandria Canal Co.* v. *Swann*, 5 How. 83. This passage from Mr. Morse's book is cited in later cases with the approval of the court apparently (*e. g.*, in *Hodge's Executor* v. *First National Bank of Richmond*, 22 Gratt. 51, 58; *First National Bank of Wellsburg* v. *Kimberlands*, 16 W. Va. 555, 578), but it cannot be said to be supported by any later decision. Of the cases on which Mr. Morse relies, the first is so badly reported that it does not appear whether the action was brought by counsel who had been employed by the president or not. If the plaintiff was not so employed, then the case is only authority for the statement by the court (SIMPSON, C. J.) that "The president of the bank, being its chief executive officer, had a right as such to appear and answer for it, and employ counsel for its defence," and as to the present point is of no value, for the authority of the president *qua* president was not in controversy (*Bank* v. *Benton*, 2 Metc. (Ky.) 240, 244). The case of the *American Ins. Co.* v. *Oakley*, 9 Paige 496, 501, sustains Mr. Morse's position, the court affirming the president's authority to act for the bank in such matters, and adding, "If the president exceeded his authority in giving such power, the corporation should look to him for any damage it may have sustained by this act of his." In *Mumford* v. *Hawkins*, 5 Denio 355, 358, the court approve and follow the case of the *Insurance Co.* v. *Oakley*, but also lay stress upon authority or ratification by the directors. The case of *Oakley* v. *Workingmen's Beneficial Society*, 2 Hilt. 487, is one in which the Common Pleas Court affirmed the right of the president of the defendant society to appear as its attorney in fact; and the last case, that of the *Alexandria Canal Co.* v. *Swann*, 5 How. 83, is not a point. The question there was whether the power was vested in the president *and directors* or in the stockholders.

On the other hand, it has been decided in Massachusetts that the president of a manufacturing corporation has no authority as such to commence an action in the name of the corporation: *Ashuelot Man. Co.* v. *Marsh*, 1 Cush. 507; it has been decided in Connecticut that where the bank was accustomed to appoint its attorneys by vote of the directors, the acceptance of service of process by an attorney authorized to accept such service by the president did not constitute a

legal service upon the bank: *Bridgeport Savings Bank* v. *Eldredge*, 28 Conn. 556; and it has been held by a court of first instance, but of great eminence in Pennsylvania (C. P. 1 of Phila.), that a power of attorney to institute suit executed by the president of a bank without authority from the board of directors, is not sufficient. It is true that the judge was of opinion that there was an implied restriction on the president's authority in the by-laws of the particular bank, but upon the general question he says the authorities are conflicting. ALLISON, P. J., in *Citizens' Bank* v. *Keim*, 10 Phila. 311.

In view of these decisions, the position of Mr. Morse that the president has undoubted authority to bind the bank in all questions affecting its litigation cannot be sustained as universally true. The position that in other matters he binds the bank only where he has had authority to act for the institution conferred upon him (that such authority, in other words, is not inherent in his office) is unquestionably sound, as an examination of the cases will show. Thus he has not *ex officio* the power to transfer its property or securities, and in the absence of authority to transact such business, an assignment of the property of the corporation, or an order given by him to pay its money to a third person will not operate to divert the right of the corporation: *Augusta Bank* v. *Hamlin*, 14 Mass. 180; *Gibson* v. *Goldthwaite*, 7 Ala. 281, 293; and see *First National Bank of Sturgis* v. *Bennett*, 33 Mich. 520; nor has he the power to mortgage, assign, or pledge the bank's property: *Hoyt* v. *Thompson*, 1 Seld. 320; *Leggett* v. *New Jersey Man. and Banking Co.*, Saxt. Ch. 542; nor to draw checks: *Fulton Bank* v. *New York and Sharon Canal Co.*, 4 Paige 127, 135; *Neiffer* v. *Bank of Knoxville*, 1 Head 162, nor to surrender or release claims of the bank against any person, nor to stay the collection of an execution: *Olney* v. *Chadsey*, 7 R. I. 224; *Brouwer* v. *Appleby*, 1 Sandf. 158; *Spyker* v. *Spence*, 8 Ala. 333; nor to authorize over-drafts by depositors: *Oakland Bank of Savings* v. *Wilcox*, 60 Cal. 126; nor to make a deed conveying land for the benefit of creditors: *McKeag* v. *Collins*, 87 Mo. 164; and see generally *Davis* v. *Randall*, 115 Mass. 547; *First National Bank of Wellsburg* v. *Kimberlands*, 16 W. Va. 555; *Hodge's Executor* v. *First National Bank of Richmond*, 22 Gratt. 51.

In a very large number of its transactions the president acts for the bank, and the idea of questioning his authority very seldom arises. Occasionally, however, it is disputed, and it must then be sustained by showing that power to act as he has acted was vested in him (1) by provisions in the charter or by-laws; (2) by express authorization by the board of directors in the paticular case; (3) by general authority conferred upon him by the board to act in similar cases, which may be established by proof of their acquiescence in his so acting in such numerous instances as to justify third parties in assuming that general authority had been conferred upon him; and (4) by ratification of his act by the board.

Cases arising under the first and second of these heads are cases of interpretation or evidence, not likely to afford rules of general applicability; see, for example, *Augusta Bank* v. *Hamblet*, 35 Me. 491; *Mount Sterling Turnpike Co.* v. *Looney*, 1 Metc. (Ky.) 550; *Farmers' Bank* v. *McKee*, 2 Penn. St. 318; *Ridgway* v. *Farmers' Bank*, 12 S. & R. 256; *Macbean* v. *Irvine*, 4 Bibb 17; *Fleckner* v. *Bank of the United States*, 8 Wheat. 334.

Cases under the third and fourth heads are of more importance, because more generally applicable. In *Hoyt* v. *Thompson*, 1 Seld. 320, 335, the court says, "Although in many cases the corporations have been held bound by such acts, this has been on the ground that these officers have been permitted by the directors to take the entire management into their own hands—and thus held out to the public as authorized agents for that purpose—or on the ground of subsequent satisfaction of the act, and that such ratification is equivalent to an original authority." In *Neiffer* v. *The Bank of Knoxville*, 1 Head 162, 165, the court says: "In the absence of the cashier the practice is for the president to draw and sign checks, etc., without any special authority for that purpose. And the proof further establishes that the practice in this particular bank, from its first organization, had been for the president to draw checks in the absence of the cashier." In this case the bank was held to be bound by a check so drawn, although at the time a cashier to act temporarily in the absence of the regular cashier had been appointed. In *Libby* v. *Union National Bank*, 99 Ill. 622, the president had purchased real estate for the bank to secure a debt. The court says (p. 630): "The next question in order seems to be whether Mr. Coolbaugh had authority to act for the bank in this regard. * * He was the general agent and manager of the affairs of the bank, and had been since its organization. This the proof shows abundantly. His powers, as shown by a long course of action, known to and acquiesced in, and evidently approved by the directors, fully warranted him in accepting, in satisfaction of suspended paper, any valuable thing which, in his judgment, it seemed wise to accept. It is strenuously insisted, because there is no special grant of such power to him, as president, found in the by-laws, that he had in fact no such power. There are many things done daily in every bank which are in fact and in law the acts of the bank, and of which no mention is made in the by-laws." The bank was held to be bound by the acts of the president. And see also *Foster* v. *Essex Bank*, 17 Mass. 479; *Dougherty* v. *Hunter*, 54 Penn. St. 380; *Parker* v. *Donnally*, 4 W. Va. 648; *Burton* v. *Barley*, 9 Biss. C. C. 253.

In the case of *Rich* v. *State National Bank*, 7 Neb. 201, we find a good example of cases of ratification by a bank. The president agreed to give ten shares of the stock of the bank to the plaintiff in consideration of his giving to the bank the business of his firm and becoming a director. Plaintiff having performed in good faith his part of the agreement, the court held that the agreement (which was, of course, beyond the power of the president *virtute officii*) had been ratified by the bank acquiescing and receiving the benefit of it. A number of cases are cited in this opinion upon this point.

Cases arise in which there is a dispute whether the president, in performing the act, out of which the controversy arises, was acting as president or in his individual capacity. Without enlarging upon these, it is sufficient in this note to cite *Sterling* v. *Marietta & Susquehanna Trading Co.*, 11 S. & R., 179; *Terrell* v. *Branch Bank at Mobile*, 12 Ala. 502; *Markley* v. *Rhodes*, 59 Iowa 57; *Prosser* v. *First National Bank of Buffalo* [Court of Appeals of New York], 9 Central Reporter 164, as examples.

Admissions of the president of a bank, of course, bind the bank, when as to matters within the scope of his

agency: *Spalding* v. *Bank of Susquehanna County*, 9 Penn. St. 28; when as to other matters the bank is not bound: *Stewart* v. *Huntingdon Bank*, 11 S. & R. 267; *Mapes* v. *Second National Bank of Titusville*, 80 Penn. St. 163. And see on this subject *Kennedy* v. *Otol County National Bank*, 7 Neb. 59; *Hazelton* v. *Union Bank of Columbus*, 32 Wis. 34, 49; *Henry* v. *Northern Bank of Alabama*, 63 Ala. 527; *Cake* v. *Pottsville Bank* [Sup. Ct. of Penna.], 19 Weekly Notes of Cases 423.

It may be noted before closing that the preceding cases were controversies between third persons and the bank. In many cases the president renders himself personally liable to the bank by exceeding his authority, though it may be that his act has rendered the bank primarily liable to some third person. Instances of his liability will be found in *Oakland Savings Bank* v. *Wilcox*, 60 Cal. 126, where the president allowed overdrafts, and was held liable to the bank for the loss resulting: *First National Bank of Sturgis* v. *Reed*, 36 Mich. 263, where he was held personally liable for money loaned to insolvent persons; and *Citizens' Bank* v. *Wiegand* [C. P. of Phila.], 12 Phila. 496, where he was held liable for the loss of securities which he had loaned to a customer for inspection, and it was not permitted to show that such was the usual custom of banks. In *Hauser* v. *Tate*, 85 N. C. 81, it was held that the president of a bank is chargeable with constructive notice of the management of its affairs by the cashier and other subordinate officers, and where such bank is doing business without legal organization, he cannot escape the responsibility resulting from such notice by showing that he supposed himself the president of a legally constituted bank, if he has contributed the influence of his reputation to give undeserved credit to a spurious corporation.

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